Supreme Court of the United States

October Term, 1971

No. 71-1016

Supreme Court, U.S.
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FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent

(The Injunction Proceeding)

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL
Respondents

(The Curtailment Proceeding)

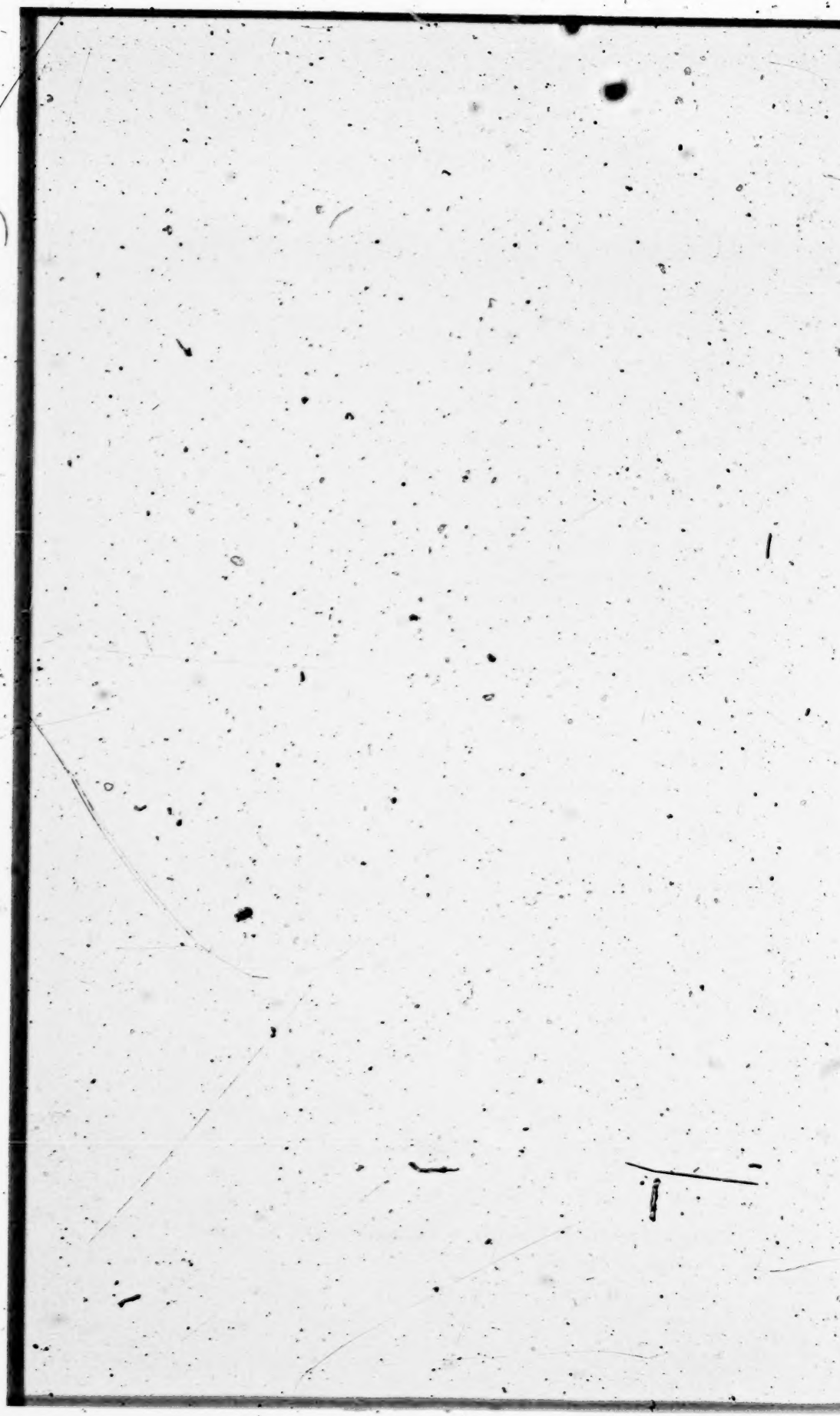
RESPONSE TO MOTION FOR EXPEDITED CONSIDERATION AND BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PREAMBLE

The petition herein is of such an irregular nature that this brief may be somewhat lenghier than would ordinarily be necessary to demonstrate the petition's lack of merit.[1]

[1] The petition's first irregularity shows up in the caption. There appears an attempt to characterize the suit ("The Collateral Proceeding") as part of the caption. The fact is that Louisiana Power & Light Company (LP&L) was the sole plaintiff in the first captioned case and it was a suit solely against Pennzoil-United, Inc., and its wholly-owned subsidiary, United Gas Pipe Line Company (United).

Probably the most important irregularity in the petition is an intangible that permeates the document, i.e., the abandonment by the FPC of its regulatory role and its adoption of the stance of the protector of United.[2] Embracing that position has caused FPC to (a) request this Court to review an FPC Order (No. 606) while it is pending review before the Court of Appeals for the Fifth Circuit, (b) attempt to convince this Court, by assertions not part of any record herein, that there is a national fuel crisis that can only be met by giving FPC an extended and extra-statutory authority for which there is no demonstrated need, and (c) attempt to mis-interpret decisions of this Court that were used by the Court of Appeals as guides to its decision in the Injunction Proceeding, all in order to buttress FPC's claim that the decision below is in conflict with decisions of this Court. Our opposition addresses itself to these matters.

JURISDICTION

There is unquestionably jurisdiction of the Injunction Proceeding under 28 U.S.C. § 1254 (1). However, the Curtailment Proceeding arises from an FPC order, an administrative agency determination, presently pending review before the Court of Appeals, and the jurisdiction attempted to be invoked would be original rather than appellate in nature, and thus should be denied.

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for an injunction against their breach of gas supply contracts with LP&L. The Federal Power Commission (FPC) was not a party until it voluntarily intervened, and the suit made no attack upon any FPC proceeding. (See LP&L's complaint attached as Appendix "J") Mention of these irregularities would be omitted if they were picayunish, but, as will be noted throughout, they are significant. The first case will hereafter be referred to as "The Injunction Proceeding."

[2] See Commissioner Carver's description of the FPC's behavior here, at pp. 2 and 5 of his dissent in the so-called "Certificate Proceeding," Appendix "K" hereto.

QUESTIONS PRESENTED[3]

1. In the Injunction Proceeding: Whether a United States District Court has jurisdiction of a suit for breach of two contracts involving direct sales of natural gas to an industrial customer for its ultimate consumption, one of which contracts is fulfilled by furnishing gas produced, transmitted, delivered and consumed wholly in the State of Louisiana.

2. In the Curtailment Proceeding: Whether this Court should assume jurisdiction to review an administrative agency order when such order is pending review before a Court of Appeals.

STATEMENT OF THE CASE

In late October 1970, United filed with the FPC a petition for declaratory order that would permit United to curtail gas deliveries during the period from November 1, 1970 to April 1, 1971 on a system of priorities that would be in direct conflict with and defeat of the priority rights afforded LP&L in its contracts with United. (R. 6,425)[4] LP&L intervened in that proceeding (the Curtailment Proceeding) on November 25, 1970, alleging among other things that the FPC did not have jurisdiction of the United-LP&L contracts due to the direct sale exemption in Section 1 (b) of the Natural Gas Act. (R. 426) LP&L agreed, along with practically all of United's customers, upon the November 1970–April 1971 curtailment program because it had no adverse effect upon LP&L's system capabilities. (R. 6) However, United filed a supplemental application on February 22, 1971 for a curtailment program to extend from April 1, 1971 to October 31, 1971, which, it appeared

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[3]The Questions Presented in the petition have been framed in such self-serving manner that they fail to define the issues herein.

[4]"R." refers to the record before the Court in the Injunction Proceeding. (See also Appendix "A", p. 3a)

to LP&L, might have an adverse effect on LP&L's system capabilities. (R. 6) When United refused to remove LP&L from that program and honor its contracts with LP&L, this suit was instituted on March 31, 1971. The suit was brought by LP&L alone against Pennzoil United, Inc., and United Gas Pipe Line Company, claiming breaches of two gas supply contracts—one for LP&L's Sterlington Generating Station, the other for LP&L's Nine-Mile Point Generating Station (R. 1-10, 17, 129)—and requesting injunctive relief to stop United from effecting the reduction proposed (for the next day) in the amount of gas being delivered under the contracts.

However, as a result of assurances given by United's counsel in a conference before the District Judge on March 31, 1971, that the proposed reduction would be minimal (7/10 of 1%) for the April-October period, LP&L withdrew its request for a temporary restraining order, and a briefing schedule was set.

On April 26, 1971 the United dispatcher advised LP&L that the gas to be delivered to LP&L's Nine-Mile Point Station that day would be reduced to some 47,000 Mcf although the contract entitled LP&L to 80,000 Mcf per day at that Station. LP&L filed a Supplemental Complaint the next day, alleging the additional breach and renewing its request for a temporary restraining order. (R. 163) After hearing argument on the matter for some two hours,[5] the District Judge issued a restraining order on April 27. The FPC moved to intervene on April 28 and filed a motion to dismiss for lack of jurisdiction. (R. 185) Without any hearing, the District Judge dissolved the restraining order and dismissed LP&L's suit on April 29. (R. 187)

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[5] At p. 10 of its petition the FPC describes this as "an *ex parte* hearing." While this is supposed to suggest that no Court agrees with LP&L's position once the other side is heard, the fact is that United and Pennzoil were represented by multiple counsel and presented the identical arguments made by FPC below.

LP&L applied for writs of mandamus and certiorari on May 1. The Circuit Judge to whom the application was allotted declined to pass on the merits, but issued a stay of the District Court's order of April 29, and reinstated the restraining order of April 27. (R. 189) On May 5, 1971, a panel of Judges Wisdom, Coleman, and Simpson conducted a hearing on the writ application, and on May 14 (a) reaffirmed Judge Wisdom's order vacating the judgment of dismissal, (b) remanded the case to District Court for expedited hearing on the jurisdictional issue, and (c) continued the stay in effect pending hearing and judgment by the District Court. (R. 192)

A hearing was conducted on May 27, 1971 solely on the jurisdictional issue. The District Court dismissed the suit on June 30, holding that "the curtailment proceedings are well within the jurisdiction of the FPC" and LP&L must therefore exhaust its administrative remedies in the FPC before coming to Court. (R. 421-439) LP&L went forward with an expedited appeal.

The Court of Appeals heard argument on November 18 and issued its opinion on January 14, 1972, reversing the District Court and remanding for a full hearing on the merits. (Appendix "A")[6] The gravamen of the Court of Appeals opinion was that the direct sales subject of this suit were exempt under Section 1(b) of the Natural Gas Act from FPC jurisdiction; and, further, that the pipeline from which United served LP&L's Nine-Mile Point Station was an intrastate facility and thus exempt from FPC jurisdiction.

REASONS WHY WRITS SHOULD NOT BE GRANTED

The FPC specifies two reasons why writs should be granted: (a) The fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned; and

[6] Appendix references "A" through "I" are attachments to the FPC petition; from "J" onward at rear of this brief.

(b) the decision below "conflicts in principle" with prior decisions of this Court. Our discussion will adopt that order.

A. THE DECISION BELOW IS OF NO FUNDAMENTAL IMPORTANCE TO THE ADMINISTRATION OF THE ACT OR TO THE UTILIZATION OF NATURAL GAS WITH WHICH THE ACT IS CONCERNED.

The FPC draws a picture (pp. 13-16 of its petition) of its dire need for authority to regulate curtailment of *all* of United's customers, jurisdictional and non-jurisdictional, that picture being embellished with calculations that are raw speculation based upon United's predictions rather than record facts. FPC's argument as to "need" is one addressed to Congress, as eloquently said by the Court of Appeals:

> "Necessity may be the mother of invention, but need must have the paternal spouse—a legislative grant—to beget agency authority."

More important, however, is the distortion of the picture drawn by FPC. The *hard facts* are as follows:

As shown by United's own Exhibit 22 in the Curtailment Proceeding (Appendix "L" hereto), it has altogether 55 pipeline, city gate, and industrial contracts with 46 separate entities. Of those 55, eight contracts are with pipeline resale customers and five are with city gate resale customers, leaving 42 contracts with direct sale customers exempt from FPC jurisdiction. Of those 42 contracts, nine are with electric utility companies [Gulf States Utilities Company, LP&L (at two stations), Mississippi Power Company (at three stations), Mississippi Power & Light Company, New Orleans Public Service, Inc. (it is both a city gate and a boiler fuel customer), and South Mississippi Electric Power Association].

The significance of these statistics comes from a knowledge of the curtailment provisions of United's contracts with the 33 non-utility industrial customers and the 9 utility direct sale customers. So far as we can determine from

a diligent search of the Curtailment Proceeding and other sources available, the 33 non-utility industrial customers as well as all of the utility direct sale customers, have "Impairment of Delivery" provisions reading substantially and substantively identical to the following from one of those contracts:

"IMPAIRMENT OF DELIVERIES

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers." (In the industrial contracts there appears the words "including Buyer" at the end of the paragraph.) (Exhibit 59, Curtailment Proceeding).

The above Impairment of Delivery provision is substantially identical to the United Tariff on file with the FPC prior to United's attempt to curtail by filing a revised tariff in the Curtailment Proceeding.

Accordingly, it becomes obvious, when armed with the facts, that all of United's industrial customers are bound by a system of priorities that constitutes a voluntary contractual curtailment program. Plainly, then, any curtailment program fashioned by the FPC for United would, as a matter of contract (not regulation), directly affect all of the industrial customers except the six utility customers who contractually (and with the FPC imprimatur)[7] have prio-

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[7]United's filed tariff and the initial certificate issued by FPC approving direct sale contracts.

rity. It necessarily follows that the immense statistics used by FPC in drawing its picture of crisis are not real because they proceed on the false premise that *all* of the direct sale customers would be unaffected by curtailment when in fact only six utility power plant customers with nine contracts would not be affected.

Although the maps the FPC uses as Appendices "H" and "I" are not a part of any record at issue here, they are meaningless in that (1) the suggested crisis was in fact triggered by the FPC in requiring all pipeline companies to file curtailment programs whether they contemplated shortages or not (FPC Order No. 431, issued April 15, 1971) and (3) for the reasons described above with respect to United's direct sale contracts.

One final observation before we leave this question of importance to the administration of the Act: The FPC has attempted to bludgeon every Court involved in this litigation with expressions of anguish about the plight of so-called "human needs" customers, and their need for protection by the FPC. (Petition, pp. 13, 15) It is too obvious to belabor that those same hospitals and schools mentioned by FPC obtain their power from LP&L. Equally obvious is the "human need" for electricity to keep an iron lung operating or an air conditioner for a school room when it is 95° F. Fortunately, Congress has exercised the wisdom of leaving to the States the decision on use of energy in their localities.

This is not a "human needs" issue. It is an issue of money. United in utmost bad faith took on new customers after it first recognized in May 1968 that its reserves were decreasing. Appendix "M" to this brief is United Exhibit 45 in the Curtailment Proceeding showing the new and additional service initiated from May 1968 to October 31, 1969, the total peak amount being 209,119 Mcf and further new service after November 1, 1969, being a total peak amount of 914,966 Mcf. Thus after May 1968, United took on business of the total magnitude of 1,124,075 Mcf

per day. That is far more gas than all of the dire shortage estimated by speculation at p. 15 of the FPC petition.[8] Of course, that gas to new customers is being sold by United at substantially higher prices than the price obtained from existing customers. Thus, the efforts by FPC in this litigation address themselves principally, if not entirely, to giving economic assistance to United at the expense of United's existing exempt direct sale industrial customers. In Commissioner Carver's eloquent words, the FPC's jurisdiction is being used "as a shield against contracts which once appeared provident but now seem otherwise." (Appendix "K" hereto, p. 2)

Any suggestion by FPC that United's "Green System," found by the Court of Appeals to be intrastate, can have any national importance is solemn nonsense.[9] As the Court of Appeals pointed out, there are no esoteric problems involved in that issue, and no important questions with respect to contract language in an effort to cloak transactions as in *People v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486 (1965), but simply a set of physical facts establishing the mechanics of "the channel of constant flow." The Court of Appeals found the intrastate nature of that channel of flow was established by "uncontradicted evidence." The FPC was a full participant in the making of that record. There is no better basis here for certiorari than there was in the Florida Parishes Case.[10]

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[8] Those figures include pipeline customers of United, all of whom have other sources of gas supply.

[9] The local nature of the Green System is evident upon looking at the map attached hereto as Appendix "N". (Extract of LP&L-Belvin Ex. 2 in Injunction Proceeding)

[10] *Louisiana Public Service Commission v. FPC*, 359 F.2d 525, cert. den., 385 U.S. 833

B. THE DECISION BELOW DOES NOT CONFLICT IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT

The only cases of this Court mentioned by FPC as conflicting in principle with the decision below are *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190 (1947), and *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1, 81 S.Ct. 435 (1960). Those are precisely the cases used by the Court of Appeals as guides to its determination of whether direct industrial sales can be curtailed by FPC. (Appendix "A", pp. 13a-19a) The interpretation by the Fifth Circuit of those cases is the same as has been consistently made by other circuits. *Granite City Steel Company v. Federal Power Commission*, 320 F.2d 711 (D.C. Cir., 1963); *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir., 1954); *Colorado Interstate Gas Co. v. Federal Power Commission*, 185 F.2d 357 (3d Cir. 1950); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 359 F.2d 675 (8th Cir. 1956). We submit that this Court's interpretation of the Natural Gas Act in *Panhandle Eastern* and *Transcontinental*, and the interpretation of those decisions by the several circuits, are obviously of more weight and substance than the strained suggestions by FPC herein.[11] The illogic of FPC's suggestion is that it would require a complete elimination of part of the Act. FPC says (at p. 16):

> "Thus, while the application of the Act to sales is limited to sales of interstate natural gas for re-

[11] Even the FPC does not believe what it is now suggesting. The knowledgeable former Chairman, Mr. Joseph C. Swidler, stated forthrightly to Congress in June 1963 that, "The price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority." (Appendix "O" hereto) Also, in FPC Annual Report of 1970, at p. 8, there is the continuing admission of non-jurisdiction in a request by FPC that it be given jurisdiction of "load curtailment and allocation of gas by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction."

> sale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies engaged in such transportation."

For that interpretation to be correct, the only sales of natural gas that would be exempt from the Act would be those made, delivered and consummated wholly in one state. Such an interpretation would compel the interpreter to read out of the Act the specific exemption of direct industrial sales regardless of their interstate nature.

Equally defective is FPC's contention regarding the applicability of Sections 4 and 5 of the Act. FPC overlooks the limiting phrase, "subject to the jurisdiction of the Commission," in Sections 4 and 5. The absence of that limitation in Section 7(e) is the underlying basis for this Court giving the FPC initial ("veto") certificate authority in *Transcontinental*, supra.

Finally, we note FPC's Footnote 8 citation of *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266 (1950). No contention has been made by LP&L that United is not a "natural gas company" and subject to FPC accounting and reporting authority. Indeed, LP&L has not at any stage of this litigation attempted to attack collaterally (as erroneously charged by FPC) or directly, the curtailment proceedings of the FPC. LP&L concedes that FPC has authority over United to formulate a curtailment program affecting all of United's jurisdictional customers. Thus, LP&L's suit named only United and its parent, Pennzoil, and not the FPC, and LP&L sought injunctive relief only against United's breaches of contract, not against the FPC conducting any proceeding within its authority.

OPPOSITION TO WRIT IN THE CURTAILMENT PROCEEDING

The FPC suggests that this Court should issue a writ of certiorari in the Curtailment Proceeding, although that proceeding is pending review before the Fifth Circuit and is still in the custody of the FPC on a remand to a Hearing Examiner. With a candor not shown elsewhere in its petition, the FPC recognizes (p. 21) that it is on infirm ground. We submit, in accord with FPC's expressed concern, that this Court would be exercising an original jurisdiction contrary to Article III, Section 2, of the U. S. Constitution, if it issued a writ under these circumstances. Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th Ed., 1969); Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 132, 164 (Fn. 6); *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576, 50 S.Ct. 419 (1930)

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari in both the Injunction Proceeding and the Curtailment Proceeding should be denied. Moreover, because of the burden upon LP&L and all others similarly situated of being now curtailed by United pursuant to unauthorized orders of the FPC, LP&L has formulated this Brief in Opposition with considerable speed so that this urgent request could be made that this Court expedite action on the petition for writs, and, indeed, forthwith deny same.

* * * * *

RESPONSE TO MOTION FOR EXPEDITION

If the Court were to decide to issue a writ or writs herein, then LP&L would join in requesting all possible expedition for the same reasons immediately above stated.

Respectfully submitted,

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February 14, 1972

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 1972, three copies of the foregoing Response to Motion for Expedited Consideration and Brief in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed from Washington, D. C., postage prepaid, to:

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I further certify that all other parties required to be served are being served on Wednesday, February 16, 1972, due to the unavailability of facilities for service in New Orleans, Louisiana on February 15, 1972, that being an official holiday known as Mardi Gras.

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Counsel for Respondent

COMPLAINT

Now comes Louisiana Power & Light Company (LP&L) for its complaint against the defendants, United Gas Pipe Line Company (United), and Pennzoil United, Inc. (Pennzoil), respectfully alleges:

THE PARTIES

1. Plaintiff, Louisiana Power & Light Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, and having its principal place of business in the State of Louisiana. LP&L is engaged in the generation, transmission, distribution, and sale of electric power and energy throughout 46 of the 64 Parishes in the State of Louisiana, including Ouachita Parish. LP&L operates electric generating plants known as "Sterlington Station" in the Parish of Ouachita near the community of Sterlington, and as "Nine Mile Point Station" in Jefferson Parish, Louisiana.

2. Defendants, United and Pennzoil, are corporations, duly organized and existing under and by virtue of the laws of the State of Delaware, and having their principal places of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in the States of Louisiana, Texas, Mississippi and northward and eastward into the midwest and eastern part of the United States. United has been furnishing natural gas to LP&L at both the Nine Mile Point Station and the Sterlington Station for many years under contract. United is a wholly owned subsidiary of Pennzoil.

JURISDICTION

3. It has become necessary for LP&L to bring this action for an injunction and for damages because of the continuing and anticipated breach of contract in the furnishing of natural gas by United directly, and in coordination with and

under the inducement, direction and control of Pennzoil. This Court has jurisdiction under 28 U.S.C. § 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000 and is between citizens of different states.

THE CONTROVERSY

4. The Sterlington Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 32,000 kilowatts and the largest 224,000 kilowatts. When these units were constructed between the years 1928 and 1958, the supply of natural gas in North Louisiana was sufficiently abundant so as to obviate any contemplation of securing an alternate source of fuel other than natural gas. The Nine Mile Point Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 74,000 kilowatts and the largest 750,000 kilowatts. There are no alternate sources of fuel at the Nine Mile Point Station except for emergencies of not more than 3 days.

5. LP&L has entered into several contracts with United for the supply of natural gas to the Sterlington Station. Those contracts are as follows:

(a) An Agreement dated February 20, 1956, for a term of 20 years, which contract set a maximum daily delivery obligation of not in excess of 25,000 mcf of gas, and which contract contains no hourly limitations. Copy of which contract is annexed hereto as Exhibit "A." That contract further contains an Article IX, entitled "Impairment of Deliveries," which article reads as follows:

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers first be supplied by Seller, and the remaining avail-

able gas shall be prorated by Seller among its other consumers."

This said 1956 Agreement was amended on March 29, 1963 and on November 30, 1966, the only amendment relevant to this complaint being the increase in maximum daily delivery obligation from 50,000 mcf up to 55,000 mcf. Then, on December 2, 1969, LP&L and United entered into a further amendments of the 1956 Agreement. The only change wrought by the 1969 amendment relevant to this dispute was the decrease in the maximum daily delivery obligation from 55,000 mcf down to 30,000 mcf during the calendar year 1970. No hourly maximum limitations were stipulated in any of the amendatory agreements of 1963, 1966 and 1969. On August 10, 1970, LP&L agreed to a further amendment setting the daily maximum at 25,000 mcf, effective January 1, 1971.

(b) On December 2, 1969, LP&L and United entered into a Transportation Agreement whereby United agreed to transport for LP&L gas received by United from the Antioch Field for the benefit of LP&L, said gas to be delivered to LP&L at the Sterlington Station through the same meter and intermingled with the gas delivered by United under its 1956 base Agreement with LP&L. The said Transportation Agreement contains no hourly maximum restrictions. Copy of said Agreement is annexed hereto as Exhibit "B."

(c) On May 5, 1967, LP&L and United entered into a "Standby Gas Sales Agreement," which agreement was amended as of December 2, 1969, and which agreement, as amended, provides for no guaranteed deliveries of gas, but for the sale of such gas as United may, in its sole discretion, have available for sale. Copy of said Agreement is annexed hereto as Exhibit "C."

6. LP&L has entered into a contract with United for the supply of natural gas to the Nine Mile Point Station. This contract is as follows:

(a) An Agreement dated May 6, 1968 for a term of 25 years which contract set a maximum daily delivery obligation of not in excess of 80,000 mcf. That contract further contains an Article IX entitled "Impairment of Deliveries," which article reads as follows:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied [illegible] if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

A copy of said Agreement is annexed hereto as Exhibit "D."

7. United filed an application with the Federal Power Commission (FPC) on October 26, 1970, proposing a curtailment program for most if not all of its customers for the so-called "winter months," i.e., from November 1, 1970 through March 31, 1971. Those being months when the demands for energy in LP&L's system are at low ebb, LP&L joined with most if not all of United's customers in amicably agreeing upon such curtailment program, the effect of which was nil upon LP&L's system capabilities.

8. However, United has now filed a supplemental application with the FPC by which it proposes a further curtailment program, this proposal covering the so-called "summer months," i.e., from April 1, 1971 to October 31, 1971.

9. This said curtailment program proposal by United to commence on April 1, 1971 will affect LP&L's Sterlington and Nine Mile Point Stations by reason of a reduction in gas supplied by United, all in violation of United's delivery obligations and not in accordance with the contract articles on "Impairment of Delivery" quoted hereinabove in paragraphs 5 and 6, and in violation of the provisions of its General Gas Tariff Article 12,1, as amended subsequent to the execution of said contracts.

10. United has further advised LP&L that the said proposed curtailment plan, effective April 1, 1971, will result in the curtailment of deliveries of natural gas to Nine Mile Point from the daily maximum agreed upon in the aforesaid contract of 80,000 mcf to an amount between 66,847 mcf and 35,300 mcf, and at Sterlington from the daily maximum agreed upon of 25,000 mcf to between 24,330 and some lesser amount, the exact amount of said curtailments to depend upon the extent of an alleged shortage in the supply of natural gas in the Pennzoil and United system.

11. The curtailment program proposed by United, as described by United, contemplates the curtailing of industrial users, including gas used to generate electricity which in turn is supplied to industrial users; then, after all such customers have been curtailed and if there remains an alleged shortage in the United and Pennzoil system, United contemplates curtailing gas used to generate electricity consumed by domestic consumers, and after curtailing all power stations, if there remains an alleged shortage, only then would it curtail gas used domestically. (Said program is set forth and attached as Exhibits "E" and "F".)

12. The curtailment program advanced by United described above is in contradiction and defeat of LP&L's rights under its contracts with United. The article on "Impairment of Deliveries" in the Sterlington contract quoted hereinabove provides that LP&L stands first, along with gas utilities selling gas to domestic consumers, in the event of a shortage of gas. Under the contract, only after

the public utility power plants and the gas utilities obtained their full gas requirements would there then be gas supplied by United to the consumers, and that supply would be made ratably.

The Nine Mile Point contract "Impairment of Deliveries" provision quoted hereinabove provides that the order of priority in the event of a shortage calls for the gas utilities to be fully supplied first, then the public utility power plants to be fully supplied second; and if there is not enough gas for all of the power plants, then they are to be supplied ratably. Then, thirdly would come the other consumers, and they would be supplied ratably by United. United's curtailment program constitutes and contemplates a significant change, if indeed not a reversal, of priorities of curtailment. United contemplates curtailing industrial users first, including gas used to generate electricity which in turn is supplied to industrial users; then, if there were still a shortage, United contemplates curtailing gas used to generate electricity which is consumed by domestic consumers. After that curtailment, if there were still a shortage, only then would United curtail gas used by domestic consumers. Additionally, there is no indication of what curtailments United proposes with respect to its own industrial or commercial consumers or, indeed, with any of its other customers of any kind.

13. United has represented to LP&L that the interruptions and curtailments of delivery of natural gas to Sterlington and Nine Mile Point were necessary and will be necessary in order for United to have on the days of proposed interruption and curtailment sufficient gas to supply the needs of its domestic consumers on such days. LP&L has recently been informed by United that said proposed interruptions and curtailments will not be necessary to supply the needs of domestic consumers on the days of such interruptions and curtailments due to any alleged shortage of natural gas on such days in the United and Pennzoil system, but that such interruptions and curtailments will be for the purpose of filling United's large industrial customers, some of whom are new customers who

have contracted with United for purchase of gas within the last two or three years when United knew it might be faced with a shortage of natural gas.

14. Such proposed curtailments of deliveries of natural gas by United to the Nine Mile Point and Sterlington power plants of LP&L constitute breaches, as alleged above, of the obligations of United under its gas supply contracts with LP&L described hereinabove, and, unless restrained by this Court, United will breach its obligations under such contracts by the proposed additional curtailment program to be instituted by it on April 1, 1971. Similarly, unless restrained by this Court, United's parent company, Pennzoil, will induce, direct and control such breaches of contract.

NECESSITY FOR INJUNCTIVE RELIEF

15. LP&L will suffer immediate and irreparable damage if United is not restrained from breaching and Pennzoil restrained from inducing the breach of United's contracts to sell and deliver to LP&L the volumes of natural gas that United agreed to sell and deliver in the contracts referred to hereinabove.

16. LP&L has throughout its system serving 46 of 64 Parishes in Louisiana a total of some 340,000 customers, among whom are numbered some of the largest chemical and petro-chemical plants and oil refining and gas processing installations in the entire United States. The generating and transmission system of LP&L is interconnected with the systems of Central Louisiana Electric Company, Gulf States Utilities Company, Southwestern Electric Power Company, and New Orleans Public Service, Inc., being all of the other electric utility companies in the State of Louisiana. LP&L also is the supplier of electricity to nine of the thirteen rural electric cooperatives in Louisiana, which cooperatives furnish electric service to some 105,000 consumers throughout the State of Louisiana. LP&L also furnishes electricity by wholesale contract, and by standby and/or emergency agreements to nine municipalities in Louisiana, said munici-

palities furnishing electric service to some 139,000 consumers. Further, the system of LP&L is interconnected to the systems of Arkansas Power & Light Company, Mississippi Power & Light Company and Mississippi Power Company, and also participates in an electric transmission grid network known as "South Central Electric Companies" consisting of eleven large electric utility companies in the South Central area of the United States furnishing electricity to consumers on the order of 2,870,000, and which network is further interconnected with a power pool that interties the entire electric system of the United State east of the Rocky Mountains with the exception of part of the State of Texas.

17. The curtailment in the quantity of gas furnished by United during peak periods as described hereinabove to LP&L's Nine Mile Point and Sterlington Stations prevents Louisiana Power & Light Company from utilizing the full generating capability of these power stations, resulting in inability to meet the demands upon said stations, the ultimate effect of which can be a "blackout" or "brownout." In an interconnected transmission grid network such as described above there is an element of interdependence of such nature as exposes the members of such network to a "domino effect" in the event of a blackout at one of the generating stations. Thus, such a blackout or brownout, depending upon the circumstances at the time, such as weather, peak demands, equipment failures, acts of God, and the like, could extend and expand such blackout to cover an area as large as the whole State of Louisiana or, indeed, a several-State area such as occurred during the notorious "Northeast Blackout" in 1965. A blackout of any magnitude would constitute irreparable injury, and would cause damage to LP&L beyond any means of calculation, but would, if only in the slightest degree be of a magnitude amounting to millions of dollars.

18. Apart from the irreparable injury that may be suffered by LP&L as described above, if the unwarranted breach of contract by United is permitted LP&L will suffer, until

United is enjoined, a present and continuing kind of irreparable injury. Because of LP&L's reliance upon United honoring its contract to furnish gas to Sterlington, LP&L constructed the Sterlington Station without any provisions for the use of an alternative source of energy, oil or other fossil fuel. There is no alternative source of natural gas available to LP&L for the Sterlington Station to utilize the full capacity of the Sterlington Station. Accordingly, the abovesaid curtailment in the supply of gas by United causes an additional irreparable injury to LP&L through the inability by LP&L to fully utilize the generating capability of the Sterlington Station, the loss of which capability is on the order of 60,000 kilowatts, which loss will continue to be suffered so long as United curtails the supply of gas. This loss is irreparable since electricity is a product which cannot be stored and which can be used only when there is demand therefor, and which must be supplied when the demand exists or not at all, and there is no remedy at law for this loss. Further, this loss is irreparable since it consists of a loss of use of money invested in these facilities which is incalculable, but which is substantial in view of the investment in Sterlington Station being on the order of $30,010,000.00, and at Nine Mile Point, Station about $84,000,000.00, and there is no remedy at law for this loss.

PRAYER

Accordingly, LP&L invokes the provisions of 28 U.S.C. § 1332 as well as this Court's general equity jurisdiction and respectfully requests that the Court:

(a) Issue its temporary restraining order as provided by Rule 65(b) of the Federal Rules of Civil Procedure restraining and enjoining Pennzoil and United from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for preliminary injunction and ordering said companies panies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(b) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for permanent injunction, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(c) Issue its permanent injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contract with LP&L, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(d) Grant such other and further relief at law or in equity as the Court may deem just and proper.

THEUS, GRISHAM, DAVIS
& LEIGH

Thomas W. Leigh
P.O. Drawer 1671
Monroe, Louisiana 71203

MONROE & LEMANN

Andrew P. Carter
Eugene G. Taggert
Chas. King Mallory
1424 Whitney Building
New Orleans, Louisiana 70130

Attorneys for Louisiana Power & Light Company, Plaintiff

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

H. L. Deloney, being duly sworn deposes and says that he is a Vice President of Louisiana Power & Light Company, plaintiff herein, and that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes then to be true.

H.L. Deloney, Vice President

Sworn to and subscribed
before me this __ day
of March, 1971.

NOTARY PUBLIC

APPENDIX K

United Gas Pipe Line Company Docket No. CP71-89

[Issued February 9, 1972]

CARVER, Commissioner, *dissenting*:

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more tha a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966, and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed

markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ___ FPC ___ (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present efforts to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

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[1] Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2] The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

The preceding observations are merely descriptive of the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light v. United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commission v. Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC v. Amerada Petroleum Corp., et al.*, 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment." *Otis & Co. v. SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA 3, 1951), cert. den. *sub. nom. Chenery Corp. et al. v. SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits, *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) and enforces repose "not only as respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt

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[3] In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final. *U.S. v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

John A. Carver, Jr.,
Commissioner

APPENDIX L

FPC Docket No. RP71-29
Witness: John B. Clopton
Exhibit No. 22 (JBC-2)

UNITED GAS PIPE LINE COMPANY

List of Industrial, City Gate, and Pipeline Contracts
Between United and Various Customers

Allied Paper Incorporated
Aluminum Company of America
American Cyanamid Company
Atlas Processing Company
Boise Southern Company
Cities Service Oil Company
Coastal Chemical Corporation
*Clarke-Mobile Counties Gas District
**Colonial Pipeline Company
Container Corporation of America
Continental Can Company, Inc.
Courtaulds North America Inc.
Escambia Chemical Corporation
Georgia-Pacific Corporation
Gulf States Utilities Company
Ideal Cement Company
Division of Ideal Basic Industries, Inc.
International Paper Company – Mobile, Alabama
International Paper Company – Moss Point, Mississippi
International Paper Company – Springhill, Louisiana
International Paper Company – Warren County, Mississippi
Jefferson Lake Sulphur Company
*Louisiana Gas Service Company
Louisiana Power & Light Company – Ninemile Point Plant
Louisiana Power & Light Company – Sterlington, Louisiana
Marquette Cement Manufacturing Company
Masonite Corporation
Mississippi Power Company – Plant Sweatt
Mississippi Power Company – Plant Jack Watson

*City Gate Resale Customers
**Pipeline Resale Customers

Mississippi Power Company – Plant Eaton
Mississippi Power & Light Company
**Mississippi River Transmission Corporation
*Mobile Gas Service Corporation
Monsanto Company
National Gypsum Company
**Natural Gas Pipeline Company of America
*New Orleans Public Service Inc.
Olinkraft, Inc.
Porter, H. K., Company, Inc.
Scott Paper Company
Shell Oil Company
South Mississippi Electric Power Association
**Southern Natural Gas Company – Monroe, Louisiana
**Southern Natural Gas Company – Kosciusko, Mississippi
Southland Paper Mills, Inc.
Southwest Potash Corporation,
a Subsidiary of American Metal Climax, Inc.
Stauffer Chemical Company
St. Regis Paper Company – Escambia County, Florida
St. Regis Paper Company – Wanilla,
Lawrence County, Mississippi
Tenneco Chemicals, Inc. Newport Division
**Texas Eastern Transmission Corporation – Longview &
West Monroe
**Texas Eastern Transmission Corporation – Kosciusko,
Mississippi
**Texas Gas Transmission Corporation
Texas Gulf Sulphur Company
*United Gas, Inc.
Willmut Gas & Oil Company

APPENDIX M

Docket No. RP71-29
Exhibit No. 4-5

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service:

	Page
Initiated After November 1, 1969	1
Initiated Between May 1968 and October 31, 1969	2

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service Initiated Between May 1968 and October 31, 1969

(Mcf at 14.73 psia)

Customer	Location	Docket No.	Date of Certificate Order	Date Service Commenced	Volume in Mcf Peak Day	Volume in Mcf Annual
Courtalds North America, Inc.	Salco, Ala.	G-13142		6-1-69 1/	4,000	438,000
Cities Service Oil Co.	Lake Charles, La.			2-1-69 1/	15,000	5,475,000 2/ 4/
Mississippi Power Co.	Gulfport, Miss.			3-1-69 1/	16,000	4,088,000
Texas Gas Transmission Corporation	Monroe, La.	CP68-14	3-11-68	11-1-68	100,000	36,500,000 2/
City of Gary, Texas	Panola County, Tex.	CP68-152	1-23-68	12-1-68	1,650	91,500 4/
Mississippi River Transmission Corp.	Monroe Field, La.	CP68-22[illegible]	Final Order 4-24-69	10-21-68 1/	50,000	18,250,000 2/
Bay Prairie Aggregate Corp.	Wharton County, Tex.	CP68-277	6-4-68	9-17-68	7,500	2,100,000 5/
Southland Oil Co.	Jasper County, Miss.	CP68-277	6-4-68	9-17-68	2,000	547,500
Humble Oil & Refining Co.	Iberia Parish, La.	CP68-300	6-26-68	7-1-68	3,500	525,000
City of Naklaw, Texas		CP69-[illegible]	7-22-69	10-6-69	1,425	102,900
Budget application		CP69-38	10-21-68		8,044	358,769
Total between May 1968 and October 31, 1969					209,119	68,476,669

1/ Temporary authorization granted to begin deliveries.
2/ Based on 100% Load Factor.
3/ Effective date as shown on Ex. 15, page 4.
4/ Third year estimate.
5/ Fifth year estimate.
6/ Contract expires 9-1-72.

2m.

Docket No. RP71-29
Exhibit No. 2
Page 2 of 2

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service Initiated After November 1, 1969

(Mcf at 14.73 psia)

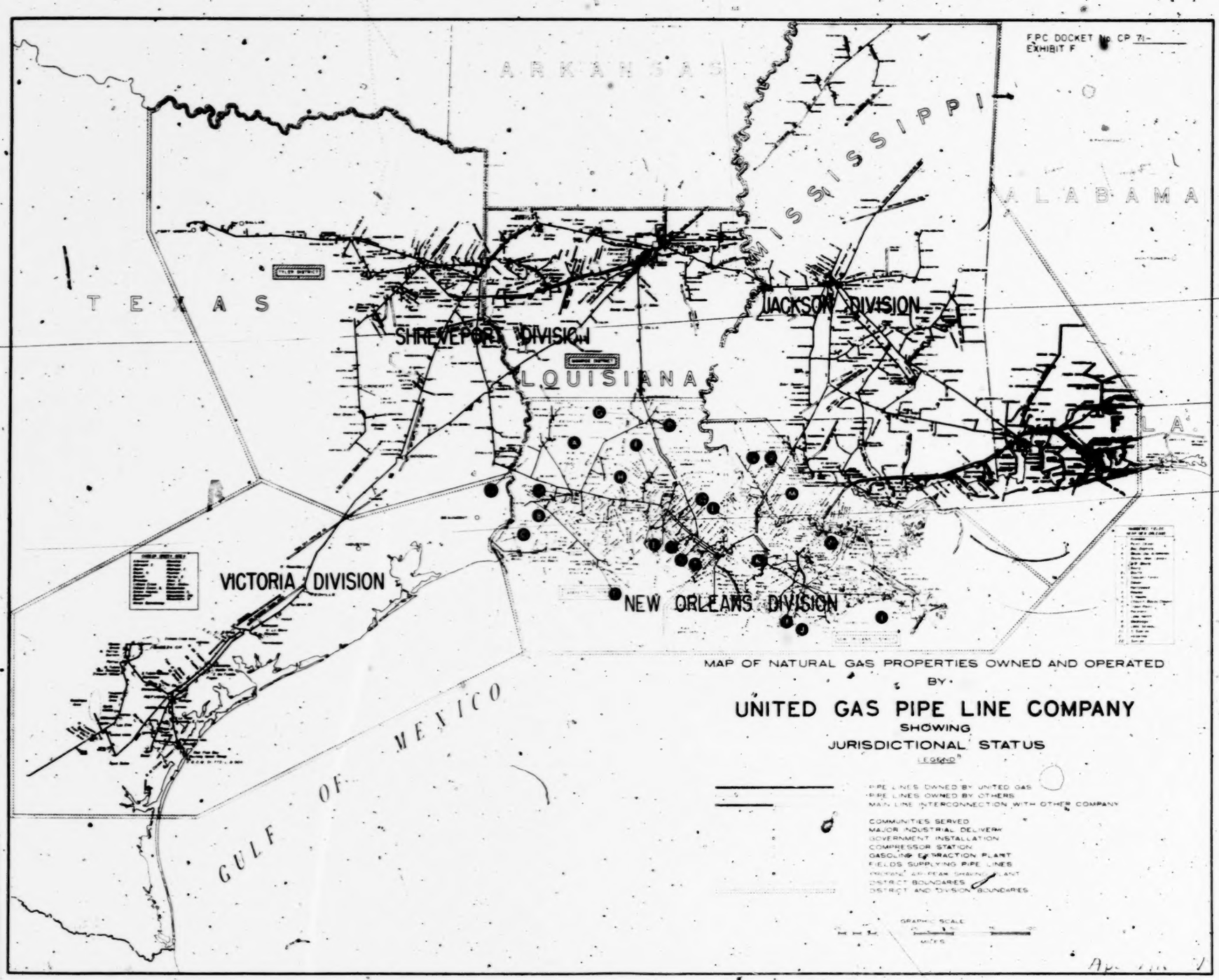
Customer	Location	Docket No.	Date of Certificate Order	Date Service Commenced	Volume in Mcf Peak Day	Volume in Mcf Annual
Texas Gas Transmission Corporation	Monroe, La.	CP68-14	3-11-68	11-1-69	50,000	18,250,000 1/
" " " "	" "	"	"	11-1-70	50,000	18,250,000 1/
Stauffer Chemical Co.	LeMoyne, Ala.	G-13142		1-1-70	1,300	474,500 2/
Mid-Louisiana Gas Co.	Fowler, La. or Baton Rouge, La.	CP69-341	9-17-69 Amended 11-18-70	11-2-70	40,000	6,040,000 3/
Budget application		CP70-43	8-25-69		4,589	277,255
Georgia-Pacific Corp.	Taylorville, Miss.	CP70-44	10-14-69	5-14-70	2,400 4/	420,000
Gulf Power Co. - Crist Plant 4/	Near Pensacola, Fla.	CP70-109	2-17-70	5-4-70	84,000 5/	17,875,000
City of Chireno, Texas	Chireno, Texas	CP68-159	4-18-68	4-23-70	3,500	221,750
Existing Distribution Companies & Direct Industrials	Shreveport, La. & Jackson, Miss. Divisions	CP70-148	5-5-70	1/	497,557 3/	22,884,010
Mid-Louisiana Gas Co.	So. Louisiana	CP71-141	1-4-71		40,000 4/	14,600,000 4/
Georgia-Pacific Corp.	Goss, Miss.	CP70-169	4-13-70	5-5-70	500	180,000
Louisiana Plywood Corp.	Wyatt, La.	CP70-223	6-22-70	8-22-70	680	170,000
Mississippi River Transmission Corp.	Near Monroe, La.	CP70-278	8-28-70	11-3-70	51,721	18,878,165
Escambia Chemical Corp.		CP70-297	8-28-70		12,000 6/	3,066,000
Budget application		CP71-34	11-4-70		2/	2/
Total after November 1, 1969 (Total page 1)					705,847	106,986,780
Total after May 1968 (Total pages 1 and 2)					914,966	175,463,449

1/ Not furnished in record--construction commenced 5-11-70.
2/ Not available.
3/ Represents increase in market requirements for the Shreveport and Jackson Areas between 1968 and 1971 less duplications.
4/ March 1 through October 31 for years 1970 and 1971 only.
5/ 40,000 Mcf per day for 151 days. (Periods 11-1-69 to 3-31-70 & 11-1-70 to 3-31-71.)
6/ Only 6,000 Mcf included in totals.
7/ Based on 100% Load Factor.
8/ Not included in totals.

Docket No. RP71-29
Exhibit No. ___
Page 1 of 1

3m

In


FPC DOCKET NO CP 71-
EXHIBIT F
ARKANSAS
MISSISSIPPI
ALABAMA
TEXAS
SHREVEPORT DIVISION
JACKSON DIVISION
LOUISIANA
VICTORIA DIVISION
NEW ORLEANS DIVISION
GULF OF MEXICO
MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED
BY
UNITED GAS PIPE LINE COMPANY
SHOWING
JURISDICTIONAL STATUS
LEGEND
PIPE LINES OWNED BY UNITED GAS
PIPE LINES OWNED BY OTHERS
MAIN LINE INTERCONNECTION WITH OTHER COMPANY
COMMUNITIES SERVED
MAJOR INDUSTRIAL DELIVERY
GOVERNMENT INSTALLATION
COMPRESSOR STATION
GASOLINE EXTRACTION PLANT
FIELDS SUPPLYING PIPE LINES
ORIENTAL KAPLEAU SHAVING PLANT
DISTRICT BOUNDARIES
DISTRICT AND DIVISION BOUNDARIES
GRAPHIC SCALE
MILES

JURISDICTION OF FEDERAL POWER COMMISSION OVER CERTAIN INTERSTATE SALES OF NATURAL GAS

Mr. MAGNUSON. Mr. President, by request, I introduce, for appropriate reference, a bill to amend the Natural Gas Act to vest jurisdiction in the Federal Power Commission over certain interstate sales of natural gas for industrial use. I ask unanimous consent that a letter from the Chairman of the Federal Power Commission, requesting the proposed legislation, be printed in the RECORD.

The VICE PRESIDENT. The bill will be received and appropriately referred; and, without objection, the letter will be printed in the RECORD.

The bill (S. 1734) to amend the Natural Gas Act to vest jurisdiction in the FEDERAL POWER COMMISSION over certain interstate sales of natural gas for industrial use, introduced by Mr. Magnuson, by request, was received, read twice by its title, and referred to the Committee on Commerce.

The letter presented by Mr. Magnuson is as follows:

FEDERAL POWER COMMISSION
Washington, D.C., June 12, 1963.

HON. LYNDON B. JOHNSON,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I am submitting herewith as part of the Commission's 1963 legislative program a proposed amendment to section 1 of the Natural Gas Act to give the Federal Power Commission jurisdiction over direct interstate sales of natural gas by producers and by pipelines to industrial consumers. Most industrial consumers purchase natural gas from local distribution companies which, in turn, purchase if from interstate pipelines for distribution to residential, commercial, and industrial customers. Not infrequently, however, industrial customers buy from the pipeline directly or in some instances directly from a producer with a pipeline providing merely a transportation function.

Under existing law the Commission's authority is limited to sales for resale in interstate commerce: hence, *the price and other terms of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.* Similarly, existing law can be construed to permit a natural gas producer to escape the Commission's rate jurisdiction by contracting directly with industrial consumers and having a new or existing pipeline transport gas for the producer's account.[1] As explained more fully below, this gap in the Commission's jurisdiction has not been closed by adequate State regulation. As a result, the pipeline companies have set industrial gas prices to some industrial customers at levels exceeding costs plus reasonable profits, and are free to discriminate between industrial customers. And natural gas producers seeking to escape the Commission's jurisdiction have attempted to make direct industrial sales of gas which would be transported over pipelines serving only industrial customers, even though this may lead to uneconomic transportation and may divert natural gas resources from consumer markets where its use is most in the public interest.[2]

The Natural Gas Act has been construed to leave the States free to regulate direct industrial sales, but many simply do not do so. In several States, attempts by regulatory commissions to assert jurisdiction over these sales have been thwarted by the pipelines in the State courts which have held that interstate pipelines selling to individual consumers on a contract basis are not "public utilities"[3] or that such

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[1] See, e.g., *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (dictum): Southern California Edison Co., CP5-172, application filed Dec. 23, 1960. Order Permitting Withdrawal of Application and Terminating Proceeding issued Jan. 3, 1963; Gulf Pacific Pipeline Co., CP63-223, applications filed Feb. 12, 1963.

[2] Southern California Edison Co., supra, note 1: Gulf Pacific Pipeline Co., supra, note 1.

[3] *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 116 N.E.2d 394 (1953); *Public Utilities Commission v. Colorado Interstate Gas Co.*, 142 Colo. 361, 351 P.2d 241 (1960). See *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E. 2d 503 (1955); *City of St. Louis v. Mississippi River Fuel Corp.*, 97 P.2d 727 (8th Cir., 1938). Contra: *Re Panhandle Eastern Pipeline Co.*, 21 P.U.R. 3d 267 (1957) (Illinois Pub. Service Commission): *Re: Cities Service Gas Co.*, 1931 E. P.U.R. 11 (Mo. Public Service Commission).

sales are not "intrastate".[4] Consequently, these courts have held, the transactions are beyond the reach of the State commissions. Even the States which do regulate direct pipeline industrial sales frequently only require that the pipelines file rates negotiated between them and industrial customers, but, at least in the absence of complaint, do not examine the contracts to see if they are fair, reasonable, and nondiscriminatory.[5] The absence of effective State regulation of these sales may reflect the difficulty a State commission would face in determining the portion of an interstate pipeline's total cost of service applicable solely to direct industrial sales made within the particular State. That determination would be extremely complex and time consuming.

This system invites discrimination between customers on the basis of bargaining power—one of the principal evils public utility rate regulation is designed to cure.

Since State regulation of these sales, in most cases, is either nonexistent or ineffective, industrial rates charged by interstate pipelines are often much higher than could be justified by cost considerations. The attached schedule shows just how far out of line some pipelines' industrial sale prices are. Based on cost of service studies in connection with relatively recent rate cases, the figures show that seven out of eight major pipelines' revenues from industrial sales exceeded costs—including a reasonable return on investment—by amounts ranging downward from 57 percent. Only one company's revenues from such sales approximated costs (revenues were about 1½ percent greater) and one company's prices to its direct industrial customers yielded less than an adequate rate of return. The extent to which some industrial customers may have been required to pay prices higher than might have been the case had the Commission exercised jurisdiction over the ratio is suggested by one case where the company's rate for a sale subject to the jurisdiction of this Commission to a local distributor was 23.2 cents per thousand cubic feet while its rate for an unregu-

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[4] *Texas Gas Transmission Corp. v. Mississippi Public Serv. Comm'n.*, 241 Miss. 826, 133 So.2d 526 (1961); *United Gas Pipe Line Co. v. Mississippi Public Service Commission*, 241 Miss. 762, 133 So.2d 521 (1961).

[5] Minutes of the third meeting of the Federal Power Commission Natural Gas Advisory Council, Oct. 31, 1962, p. 3. A thorough search of reported State public utility commission decisions turned up only one case in which a State commission altered a rate an interstate pipeline charged an industrial customer.

lated direct sale to an industrial consumer was 45 cents per thousand cubic feet.[6]

In addition, very large percentage increases are sometimes forced upon industrial consumers: in one instance an industrial rate was raised almost 50 percent in 1 year.[7]

These facts strongly suggest that competition alone is often inadequate to prevent rates for industrial gas sales from rising beyond cost-justified levels. This is not surprising, since in some regions and for some purposes, gas is the only available or practical fuel[8] and a particular pipeline the only available supplier.

Not only is Commission jurisdiction over direct industrial sales necessary to protect industrial gas consumers, but it would also materially assist the Commission in better discharging its existing regulatory responsibilities.

One such responsibility is to make sure that wellhead prices for gas flowing in interstate commerce are "just and reasonable." Where producers make direct industrial sales outside the Commission's jurisdiction, the prices they receive are apt to exceed the Commission's area rate ceiling.[9] It is easy to understand that this gap in the statutory scheme for producer rate regulation provides an artificial incentive to producers to sell gas directly for industrial use rather than to pipelines for sale ultimately to domestic as well as industrial consumers. These above-ceiling sales also exert an inflationary pressure on jurisdictional sales by producers and may lead to widespread price increase under existing contracts for gas already flowing subject to the Commission's jurisdiction. This is because many existing contracts provide for price increases in the event a producer in the area receives a higher price than the seller is currently receiving from an interstate, jurisdictional

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[6] *Panhandle Easter Pipe Line Co.*, 21 P.U.R. 3d 267, 276 (1957). The rate to the distributor should be somewhat lower to reflect certain economies. However, the magnitude of the difference is probably out of proportion to that which could be justified by cost considerations.

[7] *Public Utilities Commission v. Colorado Interstate Gas Co.*, supra, note 3.

[8] See, e.g., *Public Utilities Commission v. Colorado Interstate Gas Co.*, supra, note 3, at 255.

[9] See authorities cited at note 1, supra.

pipeline.[10] As a result, unregulated direct industrial sales by producers may lead to increases in the prices of gas paid by pipelines and, ultimately by residential, commercial, and industrial customers whom the Natural Gas Act seeks to protect.

Another problem which would disappear if the Commission had jurisdiction over direct sales to industrial customers is the practice of some pipelines to refuse to deliver additional gas to local distributors for resale in order to sell it directly to industrial consumers.[11] Since the unregulated direct sale can frequently be made at higher rates, the reason for the pipeline's preference is obvious. But this practice often may not be in the public interest. In the first place, it means that less gas is available for resale to consumers for home heating—a use which the Commission, with court approval,[12] has found may frequently be the best use for natural gas.

Finally, direct industrial sales by pipelines or producers may, on occasion, prevent local distributors from making industrial sales within their service areas. These sales benefit home-heating customers by enabling local distributors to make sales during off-peak periods (i.e., when warm weather reduces demand for space heating), and thus to spread the cost of their distribution facilities and those purchased gas

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[10] See, e.g., *Shell Oil Co.*, Docket No. R161-515, Opinion No. 382 (decided Mar. 15, 1963), where new purchases from producers in west Texas were alleged to have triggered price increases under El Paso Natural Gas Co.'s contracts with other producers. The increase to which these producers were alleged to have become entitled, in turn, allegedly triggered price escalation clauses in a contract between El Paso and still another producer. See also *Pure Oil Co.*, 25 FPC 383, 387-91 (1961).

[11] The problem is illustrated by the proceedings in *Arkansas-Louisiana Gas Co.*, Opinion No. 355, Apr. 18, 1962, 27 FPC 697, reversed *sub nom Granite City Steel Co. v. F.P.C.*, C.A.D.C. Nos. 17150, 17151, May 23, 1963. Extension of the time in which to seek rehearing has been requested. There a group of Mississippi's distributor customers sought to compel the pipeline to sell them additional gas which it was making available to direct industrial customers at rates not subject to Commission jurisdiction and exceeding those the Commission permitted Mississippi to charge its distributor customers. *The Commission's order allocating additional gas to the distributors was set aside on review.*

[12] *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, supra, note 1.

costs which do not vary with the amount taken[13] over a greater volume of sales. The cost per unit of gas that the residential and commercial space-heating customers must pay is, in turn, decreased. Thus, Commission jurisdiction to regulate direct industrial sales by pipelines could put an end to the pipelines' preference for such sales over sales to local distributors for resale, thereby benefiting the natural gas consumers for whose protection the Natural Gas Act was passed.

For these reasons—protection of industrial consumers, prevention of widespread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales—the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers.

Commissioner O'Connor has asked me to note his opposition to this proposal.

Sincerely,

JOSEPH C. SWIDLER,
Chairman

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[13] Many pipeline rate schedules provide for both a commodity charge—so much for each unit of gas taken—and a demand charge—so much for each unit of gas that the pipeline stands ready to deliver. The latter charge does not vary with the volume of gas the distributor actually uses.